IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LISA M. DAVIS,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	NO. 99-2717
	:	
DONALD L. KELACHNER, et al.,	:	
Respondents.	:	

MEMORANDUM AND ORDER

LEGROME D. DAVIS, J. JANUARY ___, 2003

On March 6, 1997, following a bench trial before Judge Stephen B. Lieberman in the Court of Common Pleas, Berks County, Pennsylvania Criminal Division, Petitioner was convicted of three counts of Robbery, one count of Recklessly Endangering Another Person, and one count of Simple Assault. On the same day, Petitioner was sentenced to a prison term of four to twenty years. During both the bench trial and the sentencing, Petitioner was represented by Assistant Public Defender Jeanne M. Trivellini, currently the First Assistant Berks County Defender. Petitioner did not file a direct appeal of her conviction to the Superior Court. On December 22, 1997, Petitioner filed a *pro se* Motion for Post-Conviction Collateral Relief (the "PCRA petition") pursuant to the Post-Conviction Collateral Relief Act, 42 Pa.C.S.A. § 9541 et seq. After Petitioner was appointed counsel, she filed an Amended PCRA petition on January 30, 1998, and a Second Amended PCRA petition on March 17, 1998. The PCRA hearing was held on May 12, 1998 before Judge Lieberman, who denied the PCRA petition. Petitioner did not appeal of the denial of her PCRA petition to the Pennsylvania Superior Court.

In May, 1999, Petitioner filed her original *pro se* Petition for Writ of Habeas Corpus with this Court, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). On July 27, 1999, Respondents filed an Answer to the Petition for Writ of Habeas Corpus. On February 25, 2000, after Petitioner was appointed counsel, Petitioner filed an Amended Writ of Habeas Corpus, which Petition is present before the Court. On April 28, 2000, the assigned Magistrate Judge issued a Report and Recommendation in this matter. Both Petitioner and Respondents filed objections. A hearing was held before this Court on November 26, 2002.

In her Report and Recommendation, the assigned Magistrate Judge addressed only a single issue, namely whether Petitioner's habeas petition is barred by the AEDPA's statute of limitations. "The [AEDPA] requires a state prisoner seeking a federal habeas corpus remedy to file his federal petition within one year after his state conviction has become 'final.'" Carey v. Saffold, 122 S.Ct. 2134, 2136 (2002) (citing 28 U.S.C. § 2244(d)(1)(A)). The Magistrate Judge correctly determined (and the parties do not appear to dispute) that Petitioner did not file the instant habeas petition within the one-year limitations period.[1] However, the Magistrate Judge further concluded that Petitioner had set forth a credible claim of "actual innocence," and

[1] As the Magistrate Judge correctly noted, Petitioner's state court conviction became final on April 6, 1997. Thus, under 28 U.S.C. § 2244(d), Petitioner would have had to file a habeas petition by April 6, 1998 in order to comply with the one-year statute of limitations. However, the limitations period was tolled from December 22, 1997 through June 12, 1998 (which includes the time during which Petitioner's PCRA petition was pending and the additional month during which Petitioner could have appealed the denial of her PCRA petition). See Carey, 122 S.Ct. at 2136 (citing 28 U.S.C. § 2244(d)(2)). Prior to December 22, 1997, 255 days of the one-year period had expired, leaving 110 days in the one-year period. Therefore, Petitioner was required to file a habeas petition by September 3, 1998 (110 days after June 12, 1998). Petitioner did not file the instant habeas petition until, at the earliest, May 20, 1999 (the date on which she signed the petition).

recommended that this Court certify to the Court of Appeals for the Third Circuit the unresolved issue of whether a claim of actual innocence may constitute an exception to the AEDPA's one-year statute of limitations.

The parties have entered various objections regarding the conclusions reached by the assigned Magistrate Judge in the Report and Recommendation.[2] Having carefully considered this particular issue, I cannot agree with the Magistrate Judge's conclusion that the record supports a claim of actual innocence as to Petitioner's state court convictions, and for this reason I decline to adopt the Report and Recommendation. In order to support a determination of actual innocence, Petitioner would have to establish that "'in light of all the evidence, it is more likely than not that no reasonable juror would have convicted [her].'" U.S. v. Garth, 188 F.3d 99, 107 (3d. Cir. 1999) (quoting Bousley v. United States, 523 U.S. 614, 623 (1998)). Based upon the evidence presented at trial, Petitioner has failed to satisfy this standard.[3]

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[2] Petitioner argues that Respondents have waived the statute of limitations defense by failing to raise it. Petitioner is correct that Respondents failed to raise the defense (the defense was first addressed by the assigned Magistrate Judge in the Report and Recommendation). Petitioner is also correct that a failure to raise the statute of limitations defense can constitute a waiver of the defense. Robinson v. Johnson, 2002 WL 31546341, *4 (3rd Cir. 2002). Whether this Court has the authority to *sua sponte* assert the statute of limitations defense subsequent to a respondent's waiver of the defense is an intriguing and apparently unresolved issue. See Scott v. Collins, 286 F.3d 923, 931 (6th Cir. 2002); Scott v. Johnson, 227 F.3d 260, 263 (5th Cir. 2000). However, because the petition will be denied on a distinct procedural basis, this issue need not be reached.

[3] At the bench trial on March 6, 1997, the prosecution presented: a witness who testified that on the night of August 13, 1996, she saw Petitioner on top of a man on the ground, stomping on the man's clenched hand, hitting his head against the ground, holding a knife, and saying, "Give me it," Trial Transcript, March 6, 1997 ("Trial Tr.") at 14-18; the victim who testified that on the night of August 13, 1996, he left a bar with $170 in his pocket, and was confronted by Petitioner who pushed him to the ground, kicked him multiple times, pulled out a knife, stomped on his clenched hand which was holding the money he removed from his pocket, (continued...)

Moreover, I conclude that an ultimate determination as to whether the instant habeas petition is barred by the AEDPA's statute of limitations is unnecessary because the petition must be denied on a distinct procedural basis, namely procedural default. In this case, Petitioner has twice failed to present to the appellate courts of the Commonwealth the claims she now asserts in this federal habeas proceeding. Petitioner first failed to file a direct appeal of her conviction to the Superior Court, and Petitioner also failed to file an appeal of the denial of her PCRA petition with the Superior Court. By failing to appeal in state court the claims which Petitioner now raises by her habeas petition, Petitioner has procedurally defaulted on these claims. Cristin v. Brennan, 281 F.3d 404, 409-10 (3d Cir. 2002).

"[F]ollowing a petitioner's procedural default, 'federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.'" Id. at 412 (quoting Coleman v. Thompson, 501 U.S. 722, 750 (1991)). Petitioner here must establish either "cause and prejudice" for both defaults, or

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[3](...continued)
slammed his head on the street, and said, "Give me your money or I will cut you up," id. at 48-56; a police officer who testified that when he arrived at the scene the victim had abrasions on his hand and on his forehead, id. at 77. Petitioner presented only her own testimony that the victim approached her while inside the bar, the two left the bar, the victim propositioned Petitioner for sex, Petitioner refused, the victim slapped Petitioner, Petitioner then pushed the victim to the ground, the victim attempted to burn Petitioner with a cigarette, and Petitioner then kicked the victim, stomped on his hand, and said, "Let it go." Id. at 89-95. Thus, the prosecution presented the testimony of the victim and an eyewitness, who positively identified Petitioner and presented wholly consistent versions of the events, as well as a police officer who testified regarding corroborating physical evidence. Petitioner offered only her own conflicting testimony, and therefore the fact-finder was primarily presented with a question of witness credibility. Such circumstances do not support the conclusion that it is more likely than not that no reasonable juror would have convicted Petitioner.

demonstrate that a "fundamental miscarriage of justice" will result from her continued incarceration. Cristin, 281 F.3d at 412. "To show cause and prejudice, 'a petitioner must demonstrate some objective factor external to the defense that prevented compliance with the state's procedural requirements.'" Cristin, 281 F.3d at 412 (quoting Coleman, 501 U.S. at 753).

Petitioner argues that both defaults were caused by her "serious mental illness, hospitalizations, and the high dosages of sedative drugs she is required to take." Initially, Petitioner has failed to direct the Court to any authority for the proposition that procedural default may be excused where a petitioner establishes that a failure to file an appeal in state court was the result of mental illness. However, assuming *arguendo* that a petitioner's mental illness may constitute cause for procedural default, Petitioner has not established that mental illness was, in fact, the cause of both procedural defaults.

Specifically, Petitioner has not provided evidence clearly establishing that, during the specific period of time when she could have filed a direct appeal of her conviction (from March 6, 1997 to April 6, 1997), and during the specific period of time when she could have filed an appeal of the denial of her PCRA petition (from May 12, 1998 to June 12, 1998), Petitioner suffered from some mental illness which prevented her from being able to file such appeals. At most, the medical records from the relevant time periods establish that Petitioner was consistently diagnosed as displaying a borderline personality disorder[4] and borderline intellectual functioning, and as having social and behavioral problems. The medical records do not establish

[4] "The essential feature of Borderline Personality Disorder is a pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity that begins by early adulthood and is present in a variety of contexts." Diagnostic and Statistical Manual of Mental Disorders at 650 (4th ed. 1994).

that Petitioner suffered from any form of psychotic activity which would have interfered with her ability to file appeals during the two relevant time periods.[5] Nor does the evidence establish that Petitioner's medications interfered with her ability to file such appeals.[6]

Petitioner also argues that both defaults were caused by ineffective assistance of counsel. Specifically, Petitioner's primary contention appears to be that, on both occasions, she determined that she did wish to appeal, she requested that her attorney file an appeal, and her attorney simply failed to do so.[7] "While ineffective assistance of counsel can be cause for a procedural default, the attorney's ineffectiveness must rise to the level of a Sixth Amendment violation." Cristin, 281 F.3d at 420 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)).

As to Petitioner's first procedural default, the issue of whether her failure to file a direct appeal of her state court conviction was caused by the ineffective assistance of Petitioner's trial

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[5] For example, a medical diagnoses from August 16, 1997 describes Petitioner as being "alert and oriented to person, place and time," and states that "[t]here was no evidence of psychotic activity." Exhibit P-6 at 30. A second diagnosis from September 2, 1997 states: "On the initial interview, Lisa presented herself as an alert, oriented and spontaneous individual. She reported to this interviewer the opposite of what she had said to the charge nurse who interviewed her when she came. . . . There was no evidence of psychosis . . . ." Id. at 33.

[6] For example, Petitioner's medical records indicate that between March 5, 1997 and April 5, 1997, Petitioner was taking 400 milligrams of Thorazine per day. See Exhibit P-6 at 55. However, Petitioner specifically testified that she is able to function on 400 milligrams of Thorazine. See Transcript of Hearing on November 26, 2002 ("Tr.") at 24. The only testimony or evidence of record tending to suggest that Petitioner was cognitively unable to pursue her right to appeal was provided by Petitioner. See Tr. at 15. Having observed Petitioner, this Court finds her testimony on this point to be self-serving and not worthy of belief.

[7] I note that Petitioner's ineffective assistance of counsel argument actually undermines her argument that her failures to appeal were the result of mental illness, because the essence of her ineffective assistance of counsel argument is that, in both instances, Petitioner independently determined that she wished to appeal, affirmatively requested that her attorney file an appeal, and that her attorney failed to do so. Such conduct is clearly inconsistent with the contention that Petitioner had a mental impairment that prevented her from filing an appeal.

counsel was already raised by Petitioner in her PCRA petition. Following a full hearing, Petitioner's PCRA petition was denied on the merits by Common Pleas Judge Lieberman. Judge Lieberman found that Petitioner was notified of her post-sentencing rights to file an appeal, and that Petitioner never made a timely request to her attorney that a direct appeal be made to the Superior Court. See Transcript of PCRA Hearing, May 12, 1999 at 16-17, attached as Exhibit to Respondents' Answer to Petition for Writ of Habeas Corpus. Pursuant to § 2254(d) of the AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254. Judge Lieberman's ruling was not contrary to clearly established Federal law, it did not involve an unreasonable application of clearly established Federal law, and it was not based on an unreasonable determination of the facts in light of the evidence presented. Therefore, because the issue of whether Petitioner's failure to file a direct appeal of her conviction was caused by ineffective assistance of counsel was already determined on the merits, this Court cannot reconsider this issue in the context of the instant procedural default issue.

As to Petitioner's second procedural default (the failure to appeal the denial of her PCRA petition), her counsel's allegedly ineffective assistance cannot establish cause for Petitioner's default. This is because Petitioner "had no Sixth Amendment right to representation at [her]

PCRA hearing," and, therefore, Petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. Cristin, 281 F.3d at 420 (citing Pennsylvania v. Finley, 481 U.S. 551 (1987), and Coleman, 501 U.S. at 752).

I also conclude that Petitioner cannot establish that a "fundamental miscarriage of justice" will result from her continued incarceration. "'To show a fundamental miscarriage of justice, a petitioner must demonstrate that he is actually innocent of the crime . . . by presenting new evidence of innocence.'" Cristin, 281 F.3d at 412 (quoting Keller v. Larkins, 251 F.3d 408, 415-16 (3d Cir.2001); Schlup v. Delo, 513 U.S. 298, 329 (1995) (to establish a miscarriage of justice excusing a procedural default, a habeas petitioner must "persuade[ ] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt"). Having carefully reviewed the evidence presented by Petitioner, I am unable to apprehend any new evidence since the time of the bench trial, and, as stated and explained above, I do not believe the evidence presented at trial warrants the conclusion that no reasonable fact finder could have found Petitioner guilty of the crimes charged.

In summary, Petitioner procedurally defaulted on two separate occasions. Petitioner is unable to demonstrate either cause for the default and actual prejudice as a result of the alleged violation of federal law, or that failure to consider the claims will result in a fundamental miscarriage of justice. As a result, federal review of her habeas petition is barred.

For the reasons set forth herein, the Amended Petition for Writ of Habeas Corpus will be denied. An order follows.

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O R D E R

AND NOW, this day of January, 2003, upon consideration of Petitioner Lisa M. Davis' Amended Petition for Writ of Habeas Corpus, it is hereby ORDERED that the Petition is DENIED for the reasons set forth in the accompanying Memorandum. Judgment is entered against Petitioner and for Respondents. The Clerk of Court is directed to close this matter for statistical purposes.

BY THE COURT:

Legrome D. Davis